International Brotherhood of Painters and Allied Trades of the United States and Canada, Local 813, AFL–CIO *and* Cincinnati Floor Company and Local Union No. 302, United Brotherhood of Carpenters and Joiners of America, AFL–CIO. Case 9–CD–397

April 29, 1982

DECISION AND DETERMINATION OF DISPUTE

BY CHAIRMAN VAN DE WATER AND MEMBERS FANNING AND HUNTER

This is a proceeding under Section 10(k) of the National Labor Relations Act, as amended, following charges filed by Cincinnati Floor Company, herein called the Employer, alleging that International Brotherhood of Painters and Allied Trades of the United States and Canada, Local 813, AFL–CIO, herein called the Painters, violated Section 8(b)(4)(i) and (ii)(D) of the Act by engaging in certain proscribed activity with an object of forcing or requiring the Employer to assign certain work to employees represented by it rather than to employees represented by Local Union No. 302, United Brotherhood of Carpenters and Joiners of America, AFL–CIO, herein called the Carpenters.

Pursuant to notice, a hearing was held before Hearing Officer Deborah R. Grayson on October 16 and 20, 1981. All parties appeared at the hearing and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to adduce evidence bearing on the issues. Thereafter, the Employer, the Painters, and the Carpenters filed briefs, which have been duly considered.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has reviewed the Hearing Officer's rulings made at the hearing and finds that they are free from prejudicial error. They are hereby affirmed.

Upon the entire record in this case, the Board makes the following findings:

I. THE BUSINESS OF THE EMPLOYER

The parties stipulated, and we find, that the Employer, an Ohio corporation with its principal place of business in Cincinnati, Ohio, is engaged as an interior contractor in the building and construction industry. During the past 12 months, a representative period, the Employer, in the course and conduct of its business operations, purchased and received products valued in excess of $50,000 which were shipped to its Cincinnati, Ohio, facility directly from points outside the State of Ohio.

Based on the foregoing, we find that Cincinnati Floor Company is engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the purposes of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATION INVOLVED

The parties stipulated, and we find, that both the Painters and the Carpenters are labor organizations within the meaning of Section 2(5) of the Act.

III. THE DISPUTE

A. *Background and Facts of the Dispute*

The Employer is a flooring subcontractor to Mellon-Stuart Company, which is building the Henderson Center athletic facility on the campus of Marshall University in Huntington, West Virginia. Pursuant to the terms of its contract with Mellon-Stuart, the Employer is installing polyurethane floors to form the main arena playing surface, smaller floors in other areas of the facility, and a swimming pool deck. The contract further provides for the Employer to install six wooden handball courts.

The installation of polyurethane floors involves the application of various liquids to the finished concrete slab. Before the process begins, the installers clean the concrete by sanding the floor surface. The initial step involves treating the concrete slab with a binding agent which causes the solidification of liquid polyurethane. Then a base coat of polyurethane is spread over the floor using a mixing machine and hand trowel. The installers subsequently repeat this process when applying the top coat. It is essential that these employees utilize the proper mixing ratios of polyurethane to ensure that the substance hardens during reaction with its binding agent. Upon completion of this job, the installers spray a sealer on the floor that eliminates the rough texture created by the chemical reaction. This operation must be done within 24 hours after application of the top coat to prevent dirt and debris from seeping into the floor. The next procedure is the striping phase of those floor surfaces on which athletic contests will be held. After laying down tape to define the boundaries of the various sports played there, the installers then paint the required lines on the floor using a brush, roller, or airless spray. The striping process in the main arena of the Henderson Center is extremely complex since the facility will be used for basketball, track, tennis, volleyball, and badminton. The instal-

lation process is completed when employees put another coat of sealer on the synthetic floor.

Pursuant to its national agreement with the Employer, the Carpenters International Union and its respective locals have represented the Employer's employees engaged in polyurethane floor installation for about 11 years. The Employer permanently employs about 30 mechanics represented by the Carpenters Cincinnati Local who have been trained extensively in the application of polyurethane materials. It assigns at least two of these employees to each jobsite. The mechanics ordinarily install resilient floors without any onsite supervision. Furthermore, the Employer's contract with the International Union requires it to abide by the terms of the Local agreement applicable to the jobsite. Thus, when the Employer needs additional employees to assist its mechanics, it contacts the Carpenters hiring hall in the jobsite area. It has employed about seven different employees on the Henderson Center project from the hiring hall operated by the Carpenters Local concerned herein.

In late August 1981,[1] the Employer learned from a job superintendent on the Henderson Center project that the Painters was seeking the assignment of polyurethane floor work to employees represented by it. The Painters subsequently requested a jobsite conference to discuss this issue. During the conference held on September 9, the Painters business agent, Marvin McGuire, demanded that the Employer assign the project's flooring work to employees represented by the Painters. The Employer's representative replied that he was assigning this work to employees represented by the Carpenters in accordance with the Company's established practice. Later that day, Douglas Drenik, the Employer's vice president of flooring operations, sent a letter to the Carpenters verifying its assignment of the work to employees represented by the Carpenters.

The Painters then notified its International Union that a jurisdictional dispute existed at the Marshall University jobsite. Thereafter, on September 22, the parties again held a jobsite conference concerning the work assignment dispute. They were unable to resolve the dispute because both Unions continued to claim the installation work on behalf of employees they represent. Furthermore, McGuire threatened to picket the Henderson Center project if the Employer did not reassign such work to employees represented by the Painters. The representative of the Carpenters International Union told McGuire that he would instruct employees represented by Carpenters not to honor any picket line established by the Painters.

Following this meeting, the Painters immediately commenced picketing at the jobsite. They carried signs mounted on baseball bats which stated that the Employer did not have a contract with the Painters. Thereafter, the Employer filed the instant charge on September 23. After a Federal district court subsequently issued a temporary restraining order prohibiting the conduct engaged in by the Painters, the picketing at Marshall University ceased on September 30. There has been no further picketing at the jobsite.

B. *The Work in Dispute*

The notice of hearing issued in this case describes the work in dispute as follows:

> Installing and completing various flooring work including the painting, stripping [sic] and sealing of the polyurethane floors, on the Henderson Center Project of Marshall University located at Huntington, West Virginia.

The evidence shows, as noted, that the Painters initially demanded all work involved in installing polyurethane floors at the project. Thereafter, during the hearing herein, the Painters redefined its claim for the Employer's installation work to include only those tasks involved in sealing, striping, painting, and finishing the synthetic floors. Since none of the other parties contests this limitation of the disputed work, we therefore shall confine our determination of the instant dispute to the polyurethane flooring work specifically claimed by the Painters at the hearing.

In reaching this conclusion, we have noted that the Painters also seeks to have the employees it represents perform similar work during the installation of wooden handball courts at the project. The record discloses that the Painters raised this issue for the first time at the hearing. In these circumstances, we conclude that the Painters' belated claim for such work was insufficient to give the Employer and the Carpenters notice that the instant 10(k) dispute would encompass matters beyond those specified in the notice of hearing. Accordingly, we shall not consider the installation of wooden floors in determining this dispute.

C. *The Contentions of the Parties*

The Painters argues that there is no reasonable cause to believe that it has violated Section 8(b)(4)(D) of the Act since it denies ever threatening to picket the Henderson Center project. Furthermore, according to the Painters, the picketing it did engage in was designed solely to protest the Employer's failure to enter into a collective-bargaining agreement with the Painters. In the event

[1] All dates are in 1981, unless otherwise indicated.

that the Board does decide to make a determination of this dispute, the Painters argues that the disputed work should be awarded to employees it represents in view of their possession of the requisite skills, the Employer's contract with District 12 of the Cincinnati Painters Local, area practice, and economy of operations.

The Employer contends that the Painters violated Section 8(b)(4)(D) of the Act by making threatening statements and engaging in picketing for a proscribed purpose. It submits that an award of the disputed work to employees represented by the Carpenters would be appropriate based upon their collective-bargaining agreement, the Employer's present assignment and past practice, relative skills, job impact, and efficiency and economy of operations. The Employer also contends that there is a real possibility that the dispute will continue to recur at other jobsites unless the Board makes a broad award of the work in dispute. It therefore requests that the Board extend the scope of the work award to cover the performance of such work throughout the geographical jurisdiction of Painters Local 813. The Carpenters position essentially is in agreement with that of the Employer.

D. *Applicability of the Statute*

Before the Board may proceed with a determination of dispute pursuant to Section 10(k) of the Act, it must be satisfied that: (1) there is reasonable cause to believe that Section 8(b)(4)(D) has been violated, and (2) there is no agreed-upon method for the voluntary resolution of the dispute.

With respect to (1) above, the record discloses that during the jobsite conference held on September 22, the Painters business representative, Marvin McGuire, threatened to establish a picket line if the Employer did not alter its assignment of the disputed work. While McGuire denied threatening the Employer in any manner, it is well settled that a conflict in testimony does not prevent the Board from proceeding under Section 10(k) for, in this type of proceeding, the Board is not charged with finding that a violation did in fact occur, but only that reasonable cause exists for finding such a violation. Moreover, following that meeting, the Painters immediately commenced picketing at the Henderson Center project. The Painters contends, as noted, that the object of the picketing was not the disputed work, but rather a collective-bargaining agreement with the Employer. However, McGuire admitted at the hearing that:

> . . . my local don't really care if Cincinnati Floors [sic] signs a new contract or not. They was putting out public information that Cincinnati Floor had no contract with the Painters while doing Painters normal past practice, whatever the work may be called, while they were doing the painting of the Henderson Building.

Based on McGuire's testimony and the timing of the picketing, we conclude that there is reasonable cause to believe that an object of the Painters picketing was to force the Employer to assign the disputed work to employees it represents.[2] Accordingly, without ruling on the credibility of the testimony at issue,[3] we find that there is reasonable cause to believe that Section 8(b)(4)(D) has been violated.

With respect to (2) above, there is no evidence in the record and no party otherwise contends that an agreed-upon method exists for the voluntary resolution of this dispute. We therefore find that the dispute is properly before the Board for determination under Section 10(k) of the Act.

E. *Merits of the Dispute*

Section 10(k) of the Act requires that the Board make an affirmative award of the disputed work after giving due consideration to various relevant factors.[4] As the Board has frequently stated, the determination in a jurisdictional dispute case is an act of judgment based on commonsense and experience in weighing these factors. The following factors are relevant in making a determination of the dispute before us.

1. Board certifications and relevant collective-bargaining agreements

There is no evidence that either of the labor organizationsconcerned herein has been certified by the Board as the collective-bargaining representative for a unit of the Employer's employees.

The Employer's existing contract with the Carpenters International Union, as noted, requires that it abide by all terms and conditions of the Local agreement in effect where the work is situated. Article 7 of the contract applicable to the Henderson Center jobsite provides, *inter alia*, that "the Trade Autonomy of the Union shall apply to the following divisions and subdivisions of the Trade . . . Wood and Resilient Floor Layers, and Finishers . . . ." Therefore, we conclude that the Carpenters

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[2] *Laborers' Local 676 (Clyde Stewart Excavating Co., Inc.)*, 229 NLRB 664, 665 (1977).

[3] See, e.g., *Local Union No. 334, Laborers International Union of North America, AFL–CIO (C. H. Heist Corporation)*, 175 NLRB 608, 609 (1969).

[4] *N.L.R.B. v. Radio & Television Broadcast Engineers Union, Local 1212, International Brotherhood of Electrical Workers, AFL–CIO [Columbia Broadcasting System]*, 364 U.S. 573 (1961); *International Association of Machinists, Lodge No. 1743, AFL–CIO (J. A. Jones Construction Company)*, 135 NLRB 1402 (1962).

contract with the Employer covers the work in dispute.

During the hearing, the Painters introduced evidence that the Employer is signatory to an agreement with District 12 of the Cincinnati Painters Local. This contract also requires the Employer to abide by the Local agreement applicable to the jobsite. Unlike the Carpenters contract, however, no provision in the Local agreement of the Painters specifically covers the disputed work. Indeed, the picket signs stated that there is no such contract.

Accordingly, while there are no certifications which would favor an award of the disputed work to either group of employees, we find that the Carpenters existing collective-bargaining agreement with the Employer favors an award of such work to employees represented by the Carpenters.

2. Employer's present assignment and past practice

Consistent with its practice for the past 11 years, the Employer assigned the disputed work to its employees who are represented by the Carpenters. The Employer also has expressed a preference that such work be performed by those employees. In view of the foregoing, we find that the Employer's present assignment and past practice favor an award of the disputed work to employees represented by the Carpenters.

3. Relative skills

The Employer permanently employs mechanics represented by the Carpenters who possess at least 2 years' training in the installation of polyurethane floors. These permanent employees, however, are used by the Employer to supervise less experienced groups of employees hired on a project-by-project basis. There is no evidence that the Employer requires that the employees it hires for a project have previous specific experience with polyurethane floors. Apparently, any employee with similar experience, such as on wooden floors, is qualified. In this case, both groups of employees have experience in similar work on wooden floors. In view of the foregoing, we find that this factor does not favor an award of the disputed work to either group of employees.

4. Area practice

There is evidence that employees represented by the Carpenters previously have performed the disputed work at two jobsites in the vicinity of Huntington, West Virginia. Employees represented by Painters Local 813 have not done such work. The Painters, however, also adduced evidence that employees represented by its sister Local 804 have done similar work on college campuses in Morgantown and Fairmont, West Virginia. Accordingly, we find that this factor does not favor an award of the disputed work to either group of employees.

5. Efficiency and economy of operations

Due to the operations engaged in by other subcontractors at the Henderson Center project, the Employer cannot work continuously on all the polyurethane floors required by its contract with Mellon-Stuart. Under the present assignment of the disputed work, employees represented by the Carpenters perform every function involved in the installation process. The Employer therefore is able to interchange these employees between the disputed work and other flooring work. It also can perform both the work in dispute and other tasks with one work force. The Painters employees, by contrast, are claiming only the sealing, striping, painting, and finishing of the polyurethane floors. Thus, it is evident that the fragmentation of the Employer's operations, as the Painters desires, would result in the Employer hiring additional employees to complete the same amount of work. In this situation, employees represented by either the Painters or the Carpenters might stand idle while the other group of employees finished a part of a job currently performed by the Carpenters employees.

Accordingly, we find that the factors of efficiency and economy favor awarding the disputed work to employees represented by the Carpenters.

6. Job impact

The Employer contends that an adverse award of the disputed work will result in the elimination of jobs for its mechanics represented by the Carpenters. We have noted, however, that the Painters does not seek to perform all work involved in installing polyurethane floors. Thus, the Employer would still require its mechanics' services to clean the finished concrete slab in preparation for the installation work and to spread the base and top coats of polyurethane over that surface. In these circumstances, the evidence is insufficient to establish that the Employer would dismiss any of the mechanics represented by the Carpenters in the event that the disputed work is awarded to employees represented by the Painters.

We therefore find that this factor does not favor an award of the disputed work to either group of employees.

Conclusion

Upon the record as a whole, and after full consideration of all the relevant factors involved, we conclude that the Employer's employees who are

represented by Local Union No. 302, United Brotherhood of Carpenters and Joiners of America, AFL–CIO, are entitled to perform the work in dispute. We reach this conclusion based on the Employer's current collective-bargaining agreement with the Carpenters, the Employer's present assignment and past practice, and efficiency and economy of operations. Accordingly, we shall determine the instant dispute by awarding the disputed work to employees represented by Local Union No. 302, United Brotherhood of Carpenters and Joiners of America, AFL–CIO, but not to that Union or its members. Additionally, we find that the Painters is not entitled by means proscribed under Section 8(b)(4)(D) of the Act to force or require the Employer to assign the disputed work to employees represented by it.

Scope of the Award

The Employer requests that the Board issue a broad work award on behalf of the Carpenters to be applicable throughout the Painters territorial jurisdiction. It contends that such an award is necessary to avoid further jurisdictional work interruptions at other construction sites in the Huntington, West Virginia, area. The record contains no evidence, however, which demonstrates that the Painters again will resort to means proscribed by Section 8(b)(4)(D) of the Act to obtain the disputed work as it becomes available on future jobs. We therefore find that the issuance of the broad order sought by the Employer is not warranted in this case.[5] Thus, our present determination of dispute is limited to the particular controversy which gave rise to this proceeding.

[5] See. e.g., *Local Union Number 417, International Association of Bridge, structural and Ornamental Ironworkers, AFL–CIO (Spancrete Northeast, Inc.)*, 219 NLRB 986, 989, 990 (1975).

DETERMINATION OF DISPUTE

Pursuant to Section 10(k) of the National Labor Relations Act, as amended, and upon the basis of the foregoing findings and the entire record in this proceeding, the National Labor Relations Board makes the following Determination of Dispute:

1. Employees of Cincinnati Floor Company who are represented by Local Union No. 302, United Brotherhood of Carpenters and Joiners of America, AFL–CIO, are entitled to perform the work involved in sealing, striping, painting, and finishing polyurethane floors at the Henderson Center project on the campus of Marshall University in Huntington, West Virginia.

2. International Brotherhood of Painters and Allied Trades of the United States and Canada, Local 813, AFL–CIO, is not entitled by means proscribed by Section 8(b)(4)(D) of the Act to force or require Cincinnati Floor Company to assign the disputed work to employees represented by it.

3. Within 10 days from the date of this Decision and Determination of Dispute, International Brotherhood of Painters and Allied Trades of the United States and Canada, Local 813, AFL–CIO, shall notify the Regional Director for Region 9, in writing, whether or not it will refrain from forcing or requiring Cincinnati Floor Company, by means proscribed by Section 8(b)(4)(D) of the Act, to assign the disputed work to employees represented by it rather than to employees represented by Local Union No. 302, United Brotherhood of Carpenters and Joiners of America, AFL–CIO.